

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the matter of )  
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Joint Application by BellSouth Corporation, )  
BellSouth Telecommunications Inc., and )  
BellSouth Long Distance, Inc. for Provision )  
of In-Region, InterLATA Services )  
in Georgia and Louisiana. )

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CC Docket No. 02-35

**COMMENTS OF XSPEDIUS CORP.**

Xspedius Corp. (“Xspedius”) files these comments in opposition to the Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., (collectively “BellSouth”) for authority to provide in-region, interLATA services in the States of Georgia and Louisiana, pursuant to section 271 of the Communications Act of 1934, as amended.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY.**

Xspedius is a facilities-based, Competitive Local Exchange Carrier (“CLEC”) providing local exchange and telephone toll services in the State of Louisiana.<sup>2</sup> In Louisiana, Xspedius provides facilities-based local and long distance services in Baton Rouge, Lafayette, Lake Charles, New Orleans and Shreveport. Xspedius has its principal corporate offices located at 901 Lakeshore Drive, Lake Charles, Louisiana 70601. Xspedius primarily serves small to medium size business customers in Baton Rouge, Lafayette, Lake Charles, New Orleans and

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<sup>1</sup> 47 U.S.C. § 271. *See Comments Requested on the Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Georgia and Louisiana*, Public Notice, CC Docket No. 02-35, DA 02-337 (February 14, 2002).

<sup>2</sup> Xspedius is currently providing service in five of the nine BellSouth states, including Alabama, Louisiana,

Shreveport utilizing its own facilities, and by purchasing unbundled network elements (“UNEs”), number portability and interconnection services, including collocation, from BellSouth. In order to be able to meaningfully compete with BellSouth, Xspedius must receive access to UNEs, local number portability, and interconnection, including collocation, in a timely and nondiscriminatory manner.

Since April 14, 2000, Xspedius has experienced a broad range of service affecting issues in its dealings with BellSouth. As a new entrant in Louisiana, Xspedius is dependent upon BellSouth for timely, accurate and reliable ordering systems and provisioning, and proper procedures within BellSouth to recognize, escalate and resolve customer-affecting service outages. Since April 14, 2000, Xspedius has experienced recurring problems related to these areas that impede its ability to meaningfully compete with BellSouth in Louisiana.

In support of its comments, Xspedius has attached hereto the affidavit of Ms. Debra Goodly, Director of Provisioning of Xspedius. Pursuant to the facts recited in Ms. Goodly’s affidavit, BellSouth fails to comply with Checklist Items two and eleven of Section 271(c)(2)(B) of the Telecommunications Act of 1996 (the “Act”) (See, 47 U.S.C. Section 271).

In addition to BellSouth’s failure to comply with the Competitive Checklist items noted above, it has also engaged in anticompetitive activities in Louisiana. Also attached hereto are the affidavits of Clements J. Lejeune, Jr., Vice President of Planning and Engineering, and Marymargret Williams Groom, Major Account Manager of Xspedius. These affidavits show that BellSouth is apparently using proprietary information obtained from Xspedius for the purpose of BellSouth’s own Winback efforts in violation of Louisiana Public Service Commission rules, and failing to properly monitor, escalate and repair customer-affecting outages. These

anticompetitive practices of BellSouth preclude the Commission from finding that grant of BellSouth's application would serve the public interest, convenience and necessity.<sup>3</sup>

## **II. BELLSOUTH DOES NOT SATISFY THE COMPETITIVE CHECKLIST.**

BellSouth has failed to demonstrate compliance with several sections of the Competitive Checklist. Item two of the Competitive Checklist requires BellSouth to provide “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).”<sup>4</sup> The Commission has determined that access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements (UNEs) under terms and conditions that are nondiscriminatory and just and reasonable.<sup>5</sup> An examination of BellSouth's OSS performance is therefore integral to the determination of whether it is offering all of the items contained in the competitive checklist.<sup>6</sup>

For OSS functions that are analogous to those that BellSouth provides to itself, its customers or its affiliates, the nondiscrimination standard requires BellSouth to offer requesting carriers access that is equivalent in terms of quality, accuracy and timeliness.<sup>7</sup> BellSouth must provide access that permits competing carriers to perform these functions in substantially the same time and manner as BellSouth.<sup>8</sup> For example, the Commission would not deem an incumbent LEC to be providing nondiscriminatory access to OSS if limitations on the processing of information between the interface and the back office systems prevented a competitor from performing a specific function in substantially the same time and manner as the incumbent

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3 47 U.S.C. Sect. 271 (d)(3)(c).

4 47 U.S.C. § 271(C)(2)(B)(ii).

5 Memorandum Opinion and Order, *In the Matter of Application by Verizon New England Inc., et al, for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, at Appendix D, para. 26 (February 22, 2002).

6 *Id.*, at note 70.

7 *Id.*, at para. 27.

8 *Id.*

performs that function for itself.<sup>9</sup> For OSS functions that have no retail analogue, BellSouth must offer access sufficient to allow an efficient competitor a meaningful opportunity to compete.<sup>10</sup>

BellSouth has not satisfied Item two of the Competitive Checklist because it still does not have adequate processes and procedures for the ordering and provisioning of unbundled network elements. In virtually all of its orders issued under section 271, the Commission has been emphatic about the need for adequate systems for the timely and accurate ordering and provisioning of unbundled network elements.<sup>11</sup>

Moreover, in her affidavit, Ms. Goodly describes recurring ordering and provisioning problems Xspedius has experienced when attempting to convert customers from BellSouth to Xspedius that show that BellSouth is not providing Xspedius access to OSS functions that are equivalent to that provided to itself, which deprives Xspedius a meaningful opportunity to compete. These problems include premature disconnects of customers resulting in loss of service, problems having customer numbers ported on scheduled due dates, failure to perform coordinated customer conversions as scheduled, serial clarifications of the same order, problems ordering the UNE Platform, service order accuracy problems such as BellSouth's failure to process correctly orders submitted by Xspedius – including the failure to convert the requested number of loops from BellSouth to Xspedius, and the inability to obtain information from BellSouth on the exact time customers' services will be switched from BellSouth to Xspedius.

Ms. Goodly explains that despite ongoing efforts to work with the BellSouth Account Team, Xspedius continues to experience premature disconnects of customers in Louisiana. This

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9 Id., at note 74.

10 Id. at para. 28.

11 See SBC Kansas Order at ¶¶ 30, 103, 105, and 135; SBC Texas Order at ¶¶ 91, 92, 170; Bell Atlantic New York Order at ¶¶ 83, 163-166; Second BellSouth Louisiana Order at ¶ 83.

results in the customer losing service prior to being converted to Xspedius. This problem occurs when BellSouth processes customer disconnect orders before the customer's numbers are ported to Xspedius' switches. This problem also occurs when disconnect orders are worked by BellSouth despite Xspedius notifying BellSouth of a change in the due date for a customer conversion.<sup>12</sup>

Making the experience of losing telephone service worse, when the customer contacts the BellSouth customer service center to complain about loss of service, the BellSouth customer service representative advises the customer that Xspedius is responsible for the disconnect order and refuses to accept a trouble ticket from the customer. When this happens, Xspedius must intervene by contacting BellSouth's customer service center because BellSouth's LCSC cannot contact the customer once the disconnect order has been processed by BellSouth. In the majority of these instances, Xspedius must then contact the BellSouth repair center and request that BellSouth again check the date that the customer was due to be converted to Xspedius. Only at this time will BellSouth accept a trouble ticket from the customer.<sup>13</sup>

Ms. Goodly also explains that in her experience, these premature disconnections of customers have occurred frequently since April 14, 2000 through the present time. Mr. Goodly states that it is her impression that there is also a lack of urgency on the part of BellSouth to have these customers' service reconnected once their service is lost due to the frequency of these incidents.<sup>14</sup>

Xspedius continues to experience instances where coordinated customer conversions are not performed as scheduled. Once Xspedius submits a local service request ("LSR"), BellSouth will respond with a firm order confirmation ("FOC") date. However, the scheduled conversion

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<sup>12</sup> Goodly Affidavit at para. 3.

<sup>13</sup> Goodly Affidavit at para. 4.

date is frequently missed because BellSouth fails to input or load the FOC date in its “C-Win Center.” Thus, BellSouth’s technicians are not aware that a customer conversion has been scheduled to be worked on a certain FOC date. This results in Xspedius not being able to port the customer’s number on the FOC date. When this happens, BellSouth is not willing to re-schedule the conversion, but instead requires that a new FOC date be established, which results in unnecessary delay for the customer.<sup>15</sup>

Another example of unnecessary delay that Xspedius continues to experience is BellSouth’s practice of repeatedly clarifying the same order. BellSouth may reject a customer conversion order for one reason and then when Xspedius makes the correction and sends the order back to BellSouth, BellSouth rejects it for another reason, rather than noting all errors at once. This requires Xspedius to continually re-submit the same order. Each correction delays the customer conversion another 48 hours. Additionally, Xspedius is required to pay a charge to BellSouth on each version of the order that has been clarified. Regardless of the reasons for the clarifications, an accurate one-time clarification would shorten customer conversion times.<sup>16</sup>

Xspedius also experiences recurring problems with service order accuracy where Xspedius submits service orders which are not completed accurately by BellSouth. One particular example of this problem is when Xspedius submits an order to install a certain number of customer loops, and BellSouth installs less than the number correctly set forth on the order. When the conversion order is initially submitted by Xspedius, BellSouth will respond with a firm order confirmation to Xspedius that it will install all loops requested. However, on the installation date, BellSouth will then advise Xspedius that it will install some lesser number of loops because the service order data at BellSouth’s C-WINS center shows some lesser number of

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<sup>14</sup> Id., at para. 7.

<sup>15</sup> Goodly Affidavit at para. 11.

loops than requested by Xspedius, and as earlier confirmed by BellSouth. When this happens, BellSouth delays the customer installation instead of installing on the firm order confirmation date. This results in customer frustration.<sup>17</sup>

Access to due dates is also a problem. BellSouth will not provide Xspedius exact times of delivery of loops, including T-1's. Xspedius also requests and schedules coordinated hot cuts with BellSouth. However, when the conversion time arrives, BellSouth may not be ready to perform the conversion despite prior confirmation with Xspedius.<sup>18</sup>

Another recurring problem is the accuracy of BellSouth's customer service records. For example, in many instances CSRs will indicate that some customers have local service provider freezes in place preventing the conversion of these customers' accounts. Frequently, these customers will advise Xspedius that they never authorized a local service provider freeze being placed on their accounts. Having the CSR corrected adds unnecessary delay to the conversion process. Another example of inaccurate CSRs is the inclusion of an xDSL service code. Because BellSouth refuses to provide its xDSL service to end users taking voice service from a CLEC, until this service code is removed from the CSR, BellSouth will not convert the customer account to Xspedius. Ms. Goodly states that she has experienced many instances where the xDSL service code is included on customers' CSRs when in fact these customers were not xDSL customers of BellSouth. Having this service code removed from inaccurate CSRs adds an extra 15 – 20 days to the conversion interval, which delays the installation of Xspedius service. Correction of these inaccurate CSRs also requires that these customers contact BellSouth, which

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16 Id., at para. 12.

17 Goodly Affidavit at para. 13.

18 Id., at para. 14.

provides BellSouth another sales opportunity to entice these customers from switching to Xspedius.<sup>19</sup>

Xspedius has also experienced problems ordering the UNE-Platform from BellSouth. An example of a recurring problem with UNE-P orders is BellSouth processing conversions prior to the scheduled due date requested by Xspedius.<sup>20</sup>

These problems demonstrate that BellSouth is not providing nondiscriminatory access to its OSS functions in a manner that is equivalent to the access it provides itself in terms of quality, accuracy and timeliness, which inhibits Xspedius a meaningful opportunity to compete.

Additionally, item eleven of the Competitive Checklist requires that BellSouth be in compliance with the number portability regulations of the Commission pursuant to section 251 of the Act.<sup>21</sup> Section 251 (b) (2) of the Act requires all LECs to provide number portability in accordance with requirements prescribed by the Commission. The 1996 Act defines number portability as the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability or convenience when switching from one telecommunications carrier to another.<sup>22</sup> Mere assertions that a Bell operating company is complying with its long-term number portability obligations are not sufficient to meet checklist item eleven. As the Commission stated in its *Ameritech Michigan Order*, an applicant must provide adequate documentation that it has undertaken reasonable and timely steps to meet its obligations with respect to long-term number portability.<sup>23</sup>

As explained by Ms. Goodly, Xspedius is also experiencing recurring problems having customer numbers being ported on the scheduled date due to BellSouth's failure to concur (i.e.,

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19 Goodly Affidavit at para. 15.

20 Id., at para. 16.

21 Id., at ¶ 274.

22 47 U.S.C. Sect. 153(30).

release the numbers to Xspedius) in the scheduled port date in the Number Portability Administration Center (“NPAC”) database prior to the scheduled date of the port. When BellSouth has not concurred in the porting of the customer’s numbers, on the date of the scheduled number porting, the customer may be unable to receive incoming calls. This results in Xspedius having to reschedule the conversion date with the customer, or calling the BellSouth LCSC and waiting for BellSouth to manually concur in the number porting at that time. Of course, this delay results in customer inconvenience and frustration.<sup>24</sup>

Due to these problems experienced by Xspedius in Louisiana, the Commission can not find that BellSouth has satisfied the Competitive Checklist under the Act.

### **III. BELLSOUTH ANTI-COMPETITIVE ACTIVITY.**

Apart from determining whether a Bell operating company satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience and necessity.<sup>25</sup> The Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the Competitive Checklist, and that entry will serve the public interest as Congress expected.

The public interest requirement is “a separate, independent requirement for

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23 Id., at ¶ 291.

24 Goodly Affidavit at para. 9.

25 47 U.S.C. Section 271(d)(3)(C); Memorandum Opinion and Order, *In the Matter of Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, para. 102 (February 22, 2002).

entry” that cannot be subsumed into either of the other two broad elements.<sup>26</sup> To do so, “would effectively read the public interest requirement out of the statute, contrary to the plain language of Section 271, basic principles of statutory construction, and sound public policy.”<sup>27</sup> According to the Commission:

[W]e view the public interest requirement as an opportunity to review the circumstances presented by the applications to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application. *While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that markets are open to competition.*<sup>28</sup>

About the only factor found not to be relevant by the Commission is whether the BOC has complied with the competitive checklist.<sup>29</sup>

Furthermore, any attempt to limit the factors to be considered based on prior Commission orders would be unwarranted in light of the recent decision in *Sprint Communications, Inc. v. Federal Communications Commission*, 274 F.3d 549 (Cir. D.C. 2001). In *Sprint Communications*, the Court criticized the Commission’s public interest finding specifically in Kansas and Oklahoma, and thereby declared that public interest arguments are not to be

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26 Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket 97-37, FCC 97-298 (August 19, 1997) (“Ameritech Michigan Order”) ¶¶ 385, 389.

27 *Ameritech Michigan Order*, ¶ 389.

28 Memorandum Opinion and Order, *In re: Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, FCC No. 01-29 (Jan. 19, 2001) (emphasis supplied), (“SBC Kansas-Oklahoma Order”) at ¶¶ 272-3.

29 *Ameritech Michigan Order*, ¶¶ 385, 390.

summarily dismissed or simply “brushed-off.” *Id.* at 554. The public interest standard contemplates the weighing of the entire record. Only when all the factors have been fully developed will there be a meaningful opportunity to weigh the benefits and costs of a section 271 application.

The proclaimed purpose of the federal Act is competition. *Sprint Communications, Inc. v. Federal Communications Commission*, 274 F.3d 549, 554 (Cir. D.C. 2001). It cannot be over-emphasized that it is the congressional intent to ensure that markets are open to competition and, if section 271 relief is granted, that markets remain open to competition. The United States Department of Justice has interpreted the federal Act to mean there must be “meaningful,” “substantial,” and “irreversible” competition before the public interest can be served.<sup>30</sup>

As recited in the attached affidavit of Ms. Marymargret Williams Groom, certain anticompetitive practices of BellSouth show that grant of BellSouth’s application would not be in the public interest at this time.

BellSouth has filed “WinBack” tariffs in its region states, including Louisiana. Under the tariff, BellSouth makes discounts available only to CLEC customers and not to BellSouth’s own customers. While the tariff is styled as a promotion, with an offering period of ninety days, BellSouth requires that customers sign long-term contracts (one year or more), during which term the discount would apply. The intent is to prevent CLECs from gaining market share and to prevent competition by tying up customers with long-term agreements.

In response to such anticompetitive practices, the Louisiana Public Service Commission recently adopted rules that prohibit BellSouth from engaging in any win back activities for a

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30 *Evaluation of the United States Department of Justice, Federal Communications Commission, In re Application of SBC Communications, Inc. et. al. For Provision of In-region InterLATA Services in Oklahoma*, CC Docket No. 97-121, filed May 6, 1997, at pp. 41-2.

seven day period after a customer switches to another provider, including prohibiting BellSouth's wholesale divisions from sharing information with its retail divisions – at any time, such as notice that certain end users have requested to switch local service providers, and prohibiting BellSouth from including any marketing information in its final bill sent to customers that have switched providers.<sup>31</sup>

As explained by Ms. Groom in her attached affidavit, BellSouth is apparently using proprietary information obtained from Xspedius through the BellSouth wholesale unit for the benefit of its own retail units. Following almost immediately the submission by Xspedius of orders to switch end user customers, BellSouth will contact the customers and attempt to convince these customers not to switch to Xspedius. Xspedius customers report that, after not hearing from BellSouth for years, they suddenly receive a call and/or a visit right after making the decision to switch to Xspedius.<sup>32</sup> The LPSC order cited above prohibits BellSouth's wholesale units from sharing information with its retail units *at any time*, such as notice that certain end users have requested to switch local service providers.

Additionally, as set forth in Mr. Clements J. Lejeune, Jr.'s affidavit, Xspedius has been hampered by BellSouth's poor performance and lack of responsiveness to customer affecting service outages. Xspedius experiences repeat troubles with the facilities it purchases from BellSouth, especially T-1 facilities. BellSouth may repeatedly test a T-1 facility before discovering the source of chronic problems, each time charging Xspedius a "no trouble found"

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31 Louisiana Public Service Commission, Order No. U-22252(E), *In re: Consideration and review of BellSouth's preapplication compliance with section 271 of the Telecommunications Act of 1996 and to provide a recommendation to the FCC regarding BellSouth's application to provide interLATA services originating in-region*, at page 3, (September 21, 2001).

32 Groom Affidavit at paras. 3 - 5.

charge when in fact a trouble did exist but simply was not discovered by the BellSouth technician.<sup>33</sup>

Moreover, BellSouth has failed to implement proper procedures and safeguards to ensure that customer affecting outages are prevented; and when such outages occur, BellSouth has not implemented proper procedures that enable BellSouth to timely discover the outage and take appropriate corrective action prior to Xspedius' customers losing service. Mr. Lejeune recounts a recent such outage that resulted in over 100 Xspedius customers losing service for over four hours<sup>34</sup>

Accordingly, the Commission cannot find BellSouth's provision of in-region interLATA services from Louisiana in the public interest while BellSouth continues to violate the LPSC's order by engaging in such improper and anticompetitive activities, and failing to implement procedures to ensure customer affecting outages are discovered and resolved in a timely manner.

#### **IV. CONCLUSION.**

As demonstrated in the Goodly, Groom and Lejeune affidavits, BellSouth has failed to comply with Checklist Items two and eleven, and fails to satisfy the public interest requirement under the Act. Therefore, until BellSouth corrects the recurring problems identified by Ms. Goodly, Ms. Groom and Mr. Lejeune, the Commission should not approve BellSouth's application to provide long distance service originating in Louisiana.

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<sup>33</sup> Affidavit of Clements J. Lejeune, Jr., at para. 4.

<sup>34</sup> Id., at para. 5.

Respectfully submitted:

/s/ Paul F. Guarisco

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